



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 07, 2022

Samantha W. Zutler
City of Healdsburg
1 California Street - Suite 3050
San Francisco, California 94111-5432

Re: Your Request for Advice
Our File No. A-22-006

Dear Ms. Zutler:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Sonoma County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTION

Do the conflict of interest provisions of the Act or Section 1090 prohibit the specified City officials from taking part in governmental decisions involving parks to which the nonprofit organization where they are members of the board has donated funds?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSION

No. Neither the Act nor Section 1090 prohibit the specified City officials from taking part in decisions concerning parks to which the nonprofit has donated funds.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Healdsburg seeking advice on behalf of the Vice Mayor Ariel Kelley, Planning Commissioner Carrie Hunt, and Parks and Recreation Commissioner Lacey Scott (collectively, the “City Officials”).

The City Officials founded the Healdsburg Parks Foundation in July 2021. The Foundation provides financial support to developing and maintaining City Parks. The Foundation is a charitable organization under Section 501(c)(3) of the Internal Revenue Code. The City Officials comprise three of the four Directors of the Foundation’s Board. They are not compensated for their service on the Foundation’s Board of Directors.

The Foundation’s website includes links for donations. A roster of the Board of Directors is listed on a separate page from the “Donations” page but is included on the website.

From time to time, decisions regarding parks to which the Foundation has donated funds come before the Parks and Recreation Commission, the Planning Commission, and the City Council. For example:

- The Foundation intends to donate funds to the City to be used on the park in the Montage development. The Montage developer and the City have entered into a development agreement that includes provisions regarding the park; substantial amendments to the development agreement are required to be approved by the City Council.
- The City Council may be called upon to approve a parks master plan that guides the creation and management of various City parks.
- Entitlements for future developments may require Planning Commission approval or recommendation to the Council, and/ or Council approval. These developments could include parks to which the Foundation has donated funds.

Pursuant to Healdsburg Municipal Code Chapter 2.32, Article II, the Planning Commission serves as the planning agency of the City, has all powers conferred on it by the State, is responsible for implementation of the City’s Land Use Code and subdivision ordinance, acts as the hearing body for code enforcement actions, and carries out other regulatory and advisory duties as assigned by the Council.

Pursuant to HMC Chapter 2.32, Article III, and Resolution No. 34-2019, the Parks and Recreation Commission serves in an advisory capacity to the City Council and Director of Parks and Recreation on policies and programs pertaining to public parks and recreation and has no regulatory authority.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Pertinent to your facts, the Act's conflict of interest provisions apply to financial interests based on the following:

- An interest in a business entity² in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- The official's interest in his or her personal finances and those of immediate family members. (Section 87103.)

According to the facts, the City Officials receive no compensation for their services as Directors of the Foundation's Board. Therefore, they do not have an interest in the Foundation as a source of income. Additionally, the City Officials do not have a business interest in the Foundation because, as a nonprofit organization, it is not a "business entity" as defined by the Act. (Section 82005.) Therefore, neither the nonprofit nor donors to it are a "financial interest" under the Act for the City Officials who serve on its board and they would not have a conflict of interest under the Act if they engage in governmental decisions that involve items that come before either the Planning Commission or the City Council to which the Foundation has donated funds.³

Elected Officers – Behested Payment Reports

While your facts do not state the City Officials will solicit donations to help accomplish the Foundation's purpose of providing funds to various parks, we note that although the Act does not regulate charitable fundraising, it does regulate certain conduct by elected officers relating to charitable fundraising.

When elected officers fundraise for charitable purposes, they may have to file a Behested Payment Report. A payment made at the behest of an elected officer is considered a contribution unless it is clear from the surrounding circumstances that the "payment was made for purposes unrelated to the officer's seeking or holding of elective office." (Section 82004.5(c).) Certain payments are presumed to be for purposes unrelated to an elected officer's seeking or holding of elective office, including those made principally for a charitable purpose. (Section 82004.5(c)(4).)

² Section 82005 defines a "business entity" as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

³ This assumes that a donor is not a source of income to any of the City Officials in some other capacity not related to their donations to the nonprofit.

These payments are reportable on a Behested Payment Report, California Form 803, if they are for \$5,000 or more.

Therefore, if any of the City Officials (who are elected officers) solicit or otherwise seek donations to the nonprofit, they will be required to file this report if donations from a donor total \$5,000 or more in a calendar year.

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

Under Section 1090, the prohibited act is the making of a contract in which the official has a financial interest. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) Finally, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

You state that occasionally decisions regarding parks to which the Foundation has donated funds come before the Parks and Recreation Commission, the Planning Commission, and the City Council. You therefore ask whether Section 1090 would prohibit the City Officials from taking part in these contract decisions based on their affiliation with the Foundation. Importantly, the Legislature has created various statutory exceptions to Section 1090's prohibition where the interest involved is deemed a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5. If a noninterest is present, the public official's abstention is generally not required, and the contract may be made by the agency.

Pertinent to the present situation, Section 1091.5(a)(8) establishes that an officer is not interested in a contract if his or her interest is:

That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-

exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

According to the facts, the City Officials are all members of the Foundation's Board and they receive no compensation for those services. In addition, based upon the description of issues the Foundation addresses, the primary purpose of providing financial support to develop and maintain City Parks supports an important function of the City, including the Planning Commission as well as the Parks and Recreation Commission. Based on these facts, the City Officials would have a noninterest in City contracts involving any parks to which the Foundation has donated funds. However, should they participate in decisions on such contracts, they must disclose their interest in the official records of the respective governmental bodies.

Accordingly, for purposes of the Act, the City Officials do not have a disqualifying conflict of interest in City Council decisions concerning the Foundation and, for purposes of Section 1090, they have a noninterest in City contracts involving any parks to which the Foundation has donated funds.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv